IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1054 OF 2004

Ganpat Ramchandra Dhumal & Ors. .. Appellants

Versus

Narayan R. Dhumal .. Respondent

Mr.Rajiv Patil for appellants

Ms.P.G.Bhatia for respondent.

CORAM : S.C.DHARMADHIKARI, J.

**DATE : 6TH OCTOBER 2004.**

P.C.

1. Heard Shri Patil for the appellant and Ms.Bhatia for respondent. By consent following substantial question of law is framed for my consideration:-

" *Whether the Lower Appellate Court was*

*obliged to consider the legality and validity of the decree of the Trial Court in the light of objection to the maintainability of the suit on the ground that all properties are not included in the same by the plaintiff."*

2. This second appeal is directed against the judgement and order of the 3rd Ad Hoc Additional Dist.Judge Alibaug in Civil Appeal No.7 of 2004.

3. The lower appellate court was considering the appeal preferred by the appellants herein against the judgement and decree dated 29th November 1999 in RCS No.22 of 1996.

4. Regular Civil Suit was laid by the respondent - original plaintiff for partition and separate possession in respect of the properties which are described more particularly in the appeal. That suit having been decreed partly, the appellants original defendants preferred a Regular civil appeal. It is pertinent to note that original plaintiff did not appeal from that

part of the judgement and decree of the trial court by which the suit was dismissed in respect of land S.No.102/1 and House No.85/1. The trial court granted the prayer in the suit insofar as land bearing S.No.96/3 and House No.85 situate at Murud by declaring plaintiffs to be entitled to 1/3rd share therein..

5. Shri Patil, learned Counsel for the appellants contended that the lower appellate court has not considered the objection to the decree of the trial court on the ground that another immovable property being S.No.19/13 of Aravghar not being included by plaintiff in the properties which are also liable to be partitioned in accordance with the share of the parties to the suit, the whole suit must fail. In the submission of Shri Patil, it was incumbent upon the plaintiff to have included this property in the present suit inasmuch as this is also a joint family property. In the further submission of Shri Patil, considering the nature of suit, it was open for him to contend that the judgement and decree of the trial court is bad in law to the extent it excludes this property. Further,

the decree having been passed in a suit instituted without including this property is liable to be set aside as a whole. Shri Patil submits that such objection goes to the root of the matter and the lower appellate court not having considered the same, its judgement deserves to be quashed and set aside.

6. On the other hand Ms.Bhatia, learned Counsel appearing for respondents original plaintiffs contends that issue No.5 of the judgement and decree of the trial court is based on this objection. The trial court having found that this property is not liable to be included, it being in possession of a protected tenant, its judgement and decree ultimately granting 1/3rd share of the respondents plaintiffs in one of the suit properties does not deserve to be quashed and set aside.

7. With the assistance of Shri Patil and Ms.Bhatia I have gone through the memo of appeal in the lower appellate court. Ground Nos. 6 and 7 in the memo of appeal read as under:-

"6. That lower court has wrongly come to the conclusion that as plaintiff is not in possession of land at Aravghar Survey No.19/13 there is no question of adding that property for partition."

"7. As the property of Aravghar is not included in this suit, the suit is liable to be dismissed."

8. From a perusal of the judgement and order of the lower appellate court, it appears that it was aware of this objection inasmuch as it has taken cognisance of the same in para 4 of the impugned judgement and order. However, while ultimately disposing of the appeal, the lower appellate court has neither adverted to this aspect nor has the lower appellate court considered the objection to the maintainability of the suit on the ground of non inclusion of one of the properties. Further, whether its inclusion would in any event disentitle the respondents plaintiffs from share in the other properties is an aspect not decided in the impugned judgement and order. The lower

appellate court ought to have gone into the correctness and validity of the judgement and decree of the trial court as first appellate court. It was its duty to find out as to whether the judgement and decree of the trial court can be sustained on the ground that the subject property is not liable to be included for it being in possession of a protected tenant. In my view, I need not go into this aspect, once I arrive at a conclusion that lower appellate court has failed in its duty as a court of first appeal to consider correctness and validity of the impugned judgement and decree of the trial court. In my view, interest of justice would be subserved if the judgement and order of the lower appellate court is quashed and set aside and the appeal is restored back to file for disposal by the lower appellate court on merits and in accordance with law.

9. Accordingly, following order is passed:-

a) The judgement and order in Regular Civil Appeal No.7 of 2000 delivered by the Ad-hoc Additional

Dist.Judge, Raigad, passed on 9th June 2004 is quashed and set aside;

b) Civil Appeal No.7 of 2000 is restored to file of the lower appellate court for disposal on merits and in accordanced with law;

c) Lower appellate court to decide the appeal afresh on merits and in accordance with law. It should also consider the issue of maintainability of the suit in the trial court in the light of non inclusion of one of the properties by the respondents plaintiffs.

d) All contentions on merits, including maintainability of the suit of both sides are expressly kept open. The lower appellate court to make endeavour to dispose of the appeal within a period of two months from today.

In view of disposal of the appeal the civil application does not survive and the same is

disposed of accordingly.

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